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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JOVANNY R., a Person Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

MARYANN R.,

Defendant and Appellant,

CHRISTINE G.,

Objector and Appellant.

G041827

(Consol. with G041916
& G041984)

(Super. Ct. No. DP017219)

OP I N I O N

Appeal from an order of the Superior Court of Orange County, Gary
Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Objector
and Appellant.

Marsha F. Levine, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su,
Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Christine G., a cousin of Jovanny R., appeals from an order that denied her
changed circumstances motion to be redesignated the child's caretaker, and denied her
motion for de facto parent status. Christine argues it was an abuse of discretion to
remove the child from her care initially, and to deny her motions. Maryann R., the
child's mother, joins in Christine's brief. We cannot find any error, and so affirm.

FACTS

Jovanny was taken into protective custody when he was two weeks old,
after Maryann visited an emergency room complaining she was hearing voices.
Examined, she tested positive for methamphetamine. SSA filed a dependency petition
that alleged failure to protect due to mental illness, substance abuse, and criminal activity,
along with sibling abuse based on neglect of a half-brother. (Welf. & Inst. Code, § 300,
subs. (b), (j).) Christine expressed interest in caring for Jovanny.

In July 2007, SSA temporarily placed Jovanny with Christine, after a
satisfactory home investigation and criminal background check. The petition was
subsequently sustained, Maryann was denied reunification services, and a permanency
planning hearing set. Jovanny was removed from parental custody, and SSA was vested
with custody under a direction to find a suitable placement for the child. SSA was
satisfied with Christine's care of Jovanny and he remained with her.

On October 23, 2007, a social worker visited Christine to check on
Jovanny. When she inquired about several individuals who appeared to be living there,
Christine said they were tenants who had been approved by SSA. The next day,

Christine left a message for the social worker that the landlord, her brother, had rented a room in the house to a cousin (Lupe) who “was on probation for possession and selling illegal drugs,” and she wanted to know if that was permissible.

On October 28, 2007, the social worker called Christine and told her Lupe could not remain in the home. Christine asked if SSA would approve Lupe if she submitted to a fingerprint test and passed a criminal background check (“live-scan”). The social worker gave Christine the name and number of an individual who handled such matters and Christine called the individual, who sent her forms to Lupe to apply for a criminal background check. Christine told the social worker she would notify her brother of the problem with Lupe and promised to call to report back.

Concerned, the social worker obtained a police log and, ultimately, police reports of several police visits to Christine’s residence. In August 2005, police officers had arrested Christine’s husband on misdemeanor battery charges after a domestic dispute. In September 2005, a police officer who responded to a call of drug activity at Christine’s home found one person living there had been recently arrested for possession of narcotics for sale, and a car parked in the driveway was registered to another individual with an outstanding warrant for narcotics violations. The officer found drug paraphernalia used to make methamphetamine. Christine’s husband said they were his and he was arrested; Christine told the officer she had used methamphetamine, but she was not arrested. Christine’s mother, Rosie, who was also living in the home, told the police officer she was on parole for possession for sale of narcotics.

Further investigation revealed child welfare services had substantiated a 2006 allegation the husband had sexually abused a 10-year-old niece. There also was an August 2008 report by a social worker who made a planning visit to Christine’s home and found a man caring for Christine’s minor child. When asked who he was, Christine said he was “her soon to be ex-husband [who] comes around to help out with their children.”

On November 4, 2008, not having heard back from Christine, two social workers made an unannounced visit. Christine was out. Rosie, still on probation on drug charges, was baby-sitting Jovanny, and she said Lupe was still living in the home. Jovanny was removed and placed in an emergency shelter.

Social workers met with Christine the next day. Christine said she had no say in who rented a room in the house, nor control over visitors, since the house belonged to her brother. She had told him renters had to be approved by SSA, but “[he] was more concerned with renting out the rooms . . . to meet his mortgage.” Christine said she had obtained a restraining order against her husband and he never came into the house, but would call to arrange to pick up their children for visits three times a month. Asked about the August 2008 home inspection when her husband was present, Christine said she did not recall it and could not say who the social worker had seen. She also denied the 2005 report she had admitted using methamphetamine. SSA decided not to return Jovanny to Christine’s care. At SSA’s request, the juvenile court ordered Jovanny redetained.

In December 2008, the court ordered SSA to reevaluate Christine’s home to determine whether the conditions that led to removal had been remedied and whether it was safe to place him there anew. SSA reported the social worker had called Christine, who said Lupe had moved out and her brother would not rent to anyone without SSA’s approval. She said she had two new roommates who had been approved by SSA. Upon reconsideration, SSA decided there were too many risks to return Jovanny to Christine’s care – the possibility Christine’s husband was in the home, even after his arrests for domestic violence and drug use and the sustained sexual abuse allegation, Christine’s admission of drug use, and Christine’s lack of judgment allowing Lupe into the home and leaving Jovanny in the care of Rosie.

In January 2009, Christine moved to modify the order removing Jovanny, and for de facto parent status. An evidentiary hearing was held over several days between February 26, 2009 and March 5, 2009.

The matters set out above were received in evidence. In addition, Christine testified she shared a strong bond and affectionate relationship with Jovanny, having raised him for his first four months, and it would be best for him to be placed with her so he could remain part of his natural family. She said she did not know Lupe was on probation until she had moved in, and she moved out on November 5, 2008 (the day after Jovanny was removed). Rosie cared for Jovanny only once, the day the social worker visited, and then only for 15 minutes while Christine picked up her daughter from school. Nothing in the information from SSA warned her it would be improper to allow Rosie to baby-sit for a few minutes.

Christine testified she was separated from her husband and had obtained a domestic violence restraining order against him, which expired in 2008. She did not allow him into her home, much less to care for Jovanny. She knew of the sexual abuse allegations against her husband but “he’s never gone to court for it,” and “personally, I didn’t believe . . . they were true.” The man SSA saw in her home during the August 2008 planning visit was not her husband, but a handyman named Bob. She denied using drugs and said the police report of her admission was mistaken.

The assigned social worker testified she was not aware SSA could waive the prohibition against someone with a criminal record living in a placement home. She did not know if Lupe or Rosie were still on probation. In reevaluating Christine’s home in December 2008, the social worker had not investigated who was living there. Nor did she interview Christine’s husband, Rosie, or the officers named in the police reports. The social worker believed the problem was Christine – her uncertain drug history, the delay in removing Lupe, and allowing her husband into the home.

The juvenile court found SSA acted within its discretion when it removed Jovanny. “It appears [there was an] inappropriate person caring for the child . . . who’s not been cleared . . . [an] inappropriate person living in the home, even after having been given days notice in advance . . . that person could not be present . . . , an indication from the caretaker . . . this was a situation . . . she was . . . not able to remedy because it was her brother who . . . had control over it, [and] the information regarding the drug use.” The court said it would have been preferable if the social worker had interviewed the husband, Lupe, Rosie, police and probation officers, but that did not show the information SSA had was inaccurate. Nor was the removal an abuse of discretion because the social worker, new to the job, did not know about the possibility of a waiver for Lupe, since a supervisor was consulted beforehand and approved the decision.

The court found no changed circumstances that warranted reconsideration of the removal order. It said it did not believe Christine’s testimony that her husband was not allowed in the home and Rosie would never be back, or her denial of drug use in the face of the police report. Nor had anything been done to address the prior domestic violence. The court noted it was undisputed Lupe had left, and Christine said her brother agreed to rent only to tenants approved by SSA. But, it found, these changes “do[] not address the issues that caused the agency to remove the child in the first place, not the least of which are issues of judgment by [Christine].”

De facto parent status was opposed by SSA and minor’s counsel. SSA argued, among other things, Christine “endangered Jovanny by exposing him to people who had questionable criminal histories . . . involving drugs . . . potential sexual abuse of minors [and] domestic violence.”

In denying the motion, the court noted by the time of the hearing (March 5, 2009), eight-month-old Jovanny had been out of Christine’s care for a period of four months (since November 5, 2008). It found any insight Christine might offer was “information from several months ago [that] wouldn’t be fresh information. [It] wouldn’t

be information about what's going on with the child currently, and so it seems . . . of limited probative value. It also found Christine had not acted in a parental role, particularly when she allowed Lupe to remain in her home and permitted Rosie to care for the child.

At a permanency planning hearing that followed, the court terminated parental rights and ordered Jovanny placed for adoption.

I

Christine argues it was an abuse of discretion to remove Jovanny because SSA never conducted a criminal background check on Lupe, never said a short term baby-sitter (Rosie) had to be approved, and expressed no concern over her care for her own children. We cannot agree.

The issue is whether substantial evidence supports the juvenile court's finding SSA acted reasonably when it removed Jovanny. An appellant who challenges the sufficiency of the evidence must lay out the contrary evidence and show why it is lacking. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414-415.) It is not enough to reargue the favorable evidence, as Christine does, since we cannot reweigh the evidence and substitute our decision for that of the juvenile court – much less re-decide the case based solely on appellant's view of the favorable facts.

Instead, we must determine whether substantial evidence supports the court's decision. Here, the finding is supported by ample evidence. SSA had learned Christine's husband remained a presence in the household, a troubling matter given his sustained sexual abuse allegation, domestic violence arrest, and drug paraphernalia arrest. There also was evidence Christine had used methamphetamine. Quite apart from whether SSA was required to conduct a criminal background check on Lupe that ultimately might have yielded a waiver – a point on which we express no opinion – the fact remains Christine did nothing to remove Lupe from the household pending a background check. And she never called the social worker as promised to give an update

on Lupe. When the social workers went to Christine's home to see what was going on, they learned Lupe was still there. Christine's explanation did nothing to assuage SSA's concerns for Jovanny – she claimed to have no control over renters and said her brother, the landlord, would let rooms to whoever could pay the rent. While Christine claimed to have a restraining order against her husband, she was evasive about his reported presence during the recent home inspection visit (August 2008), saying she did not recall who the social worker had seen. (Later, on the changed circumstances motion, Christine changed her story, saying it was a handyman.) On this record, then, the evidence supports the finding SSA acted within its discretion when it removed Jovanny on November 4, 2008.

II

Christine argues SSA's reevaluation of her was inadequate under the relative placement statute, which enumerates factors that must be considered. The short answer is the statute does not apply here.

Preferential consideration for placement of a child removed from parental custody must be given to a request from a relative. (Welf. & Inst. Code, § 361.3, subd. (a).)¹ “However, only the following relatives shall be entitled to given preferential consideration for placement of the child: an adult who is a grandparent, aunt, uncle, or sibling.” (§ 361.3, subd. (c)(2).)

Christine uniformly describes herself as the child's “maternal cousin” in her changed circumstances motion, de facto parent motion, and four supporting declarations. Since a cousin is not among those entitled to a relative placement preference, she cannot claim the benefit of the statute.

To avoid this consequence, Christine argues the record is “unclear” whether she is an aunt or cousin. No citation to the record is offered and for good reason. The record is perfectly clear Christine is not an aunt entitled to a relative preference.

¹

All subsequent statutory references are to the Welfare and Institutions Code.

III

Christine contends the juvenile court abused its discretion in finding no changed circumstances because SSA failed to offer evidence of current drug use or domestic violence. We disagree.

The argument misperceives the burden of proof on a changed circumstances motion. A prior order may be modified or set aside only where a parent or other interested person establishes changed circumstances and the modification would be in the best interests of the child. It is the moving party who must show circumstances have changed. (§ 388; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

Christine was the one who had to show new or different circumstances, not the other way around. SSA did not have to establish the conditions that led to removal continued unabated. Reliance on *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 is misplaced. That case held the juvenile court may review denial of a criminal waiver exemption for abuse of discretion, where a relative placement was denied because of an old conviction. In giving directions for such review, the court explained it was insufficient to deny a waiver because the applicant failed to offer evidence the conviction was one that cannot be exempted – that was something the applicant was not required to prove. Rather, the question was whether the applicable social services agency had a record of a nonexemptible offense or not. (*Id.* at pp. 1060, 1061.) The matter before us is a changed circumstances motion, not a criminal waiver application, so the rules governing the latter have no bearing.

Since there is no showing denial of the changed circumstances motion was unreasonable in light of the evidence before the juvenile court, we can find no abuse of discretion.

IV

Finally, Christine asserts it was an abuse of discretion to deny her de facto parent status because she met the applicable legal test. We think not.

“A ‘de facto parent’ is ‘a person who has been found by the court to have assumed, on a day-to-day basis, the role of a parent, fulfilling both the child’s physical and psychological needs for care and affection, and who has assumed that role for a substantial period.’ [Citations.]” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1513.) De facto status is important for two reasons – it allows one who has a “‘close and continuing relationship’” with a child to protect his or her own interest in the “‘companionship, care, custody and management’” of the child, and it provides the court with “‘critical information relating to the child’s best interests. [Citations.]’” (*Id.* at p. 1513, fn. 19.) Factors to be considered include whether the caretaker can contribute “‘information about the child unique from the other participants in the process.’” (*Id.* at p. 1513.)

We cannot say the juvenile court acted unreasonably in denying Christine de facto status. By the time of the hearing, Jovanny was eight months old and had been out of Christine’s care for four months – half his life. The court found any information Christine could provide was stale and did not reflect what was going on currently in the child’s development, so it had “‘limited probative value.’” Thus one of the purposes for de facto status – providing information to aid the court – was not met. In the case of a child only eight months old, this seems a perfectly reasonable conclusion.

To this we may add that the other reason for granting de facto parent status – protecting the caretaker’s own interest in the custody of the child – was vitiated when the court refused to return Jovanny to Christine’s care. Having removed the child from Christine’s home upon finding him in the care of a drug offender, the court was not unreasonable in discounting the value of Christine’s interest in the “‘companionship, care, custody and management’” of Jovanny. Under these circumstances, we cannot find error in denying the motion for de facto parent status.

Christine argues she had unique information to offer concerning Jovanny, having been his caretaker for the first four months of his life. But she overlooks – as we

cannot – the court’s finding that any information she might offer was dated by the time of the hearing four months later. The court had discretion to draw that conclusion and we see no reason to disturb it.

Since no abuse of discretion is shown in removing Jovanny from Christine’s home, nor in denying Christine’s changed circumstances motion or her request for de facto parent status, the order appealed from must be affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.